

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-2030

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILFRED JOHNSON,

Appellant,

-against-

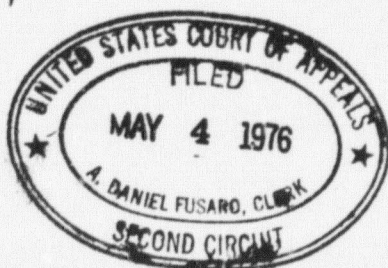
ROY BOMBARD, Superintendent,
Green Haven Correctional Facility,

Appellee.

Docket No. 76-2030

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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ROY BOMARD, Superintendent, :
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ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Whether there are any non-frivolous issues to be raised on appeal for this Court's review.

STATEMENT PURSUANT TO RULE 28(a)(3)

This is an appeal from an order of the United States District Court for the Eastern District of New York (The Honorable Leo F. Rayfiel) entered on November 10, 1975, denying without a hearing appellant's petition for a writ of habeas corpus.

On December 12, 1975, the District Court granted a certificate of probable cause and leave to appeal in forma pauperis and by order dated March 23, 1976, this Court assigned the Legal Aid Society, Federal Defender Services Unit, as counsel on appeal pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

On December 28, 1972, an indictment was filed in Supreme Court, Kings County, charging appellant with armed robbery of an A & P supermarket located in Brooklyn, New York.

A. Pre-trial hearing

Prior to trial, appellant moved to suppress any in-court identification testimony, arguing that the pre-trial identification procedures employed had been so unnecessarily suggestive as to create a substantial likelihood of irreparable misidentification.

At the pre-trial hearing, Detective James Stewart testified that on November 13, 1972, Sam Di Giose and John Tooze, employees of the A & P supermarket, were shown hundreds of photographs of individuals and that Di Giose selected appellant's as being a picture of one of the robbers (S4-5).^{*} The detective then took this photograph and four others to the A & P supermarket and showed them to Pauline Comperchio, another employee of the market, who had been present during the robbery (S6). Comperchio also selected appellant's photograph (S7). Further, the detective testified that on December 19, 1972, a line-up was held in the stationhouse, and as a result, Comperchio identified appellant as one of the individuals who had robbed the supermarket (S10). Later that day, Di Giose was shown a photograph of this line-up^{**} and although he was uncertain (S11; S27; S55-56), again selected appellant (S11). Appellant, who had remained at the stationhouse after the corporeal line-up, was then directed by the detective into a room with a two way mirror. Di Giose viewed appellant through the mirror and requested

^{*} Numerals in parentheses preceded by "S" refer to pages of the transcript of the suppression hearing held in State Court on September 24, 1973. The minutes of this hearing may be found in Respondent's Brief and Appendix filed as part of the Record on Appeal.

^{**} The detective testified that another line-up was not conducted because the members of the line-up had been "dispersed" (S11). There was no allegation that the line-up itself or the photographic displays were suggestive.

that appellant put on a jacket* and say "Give me all your money, this is a stick up?", words spoken by one of the robbers (S12, S28, S68; S74). After this show-up, Di Giose was sure that appellant had committed the robbery (S12; S56).

Pauline Comperchio and Sam Di Giose also testified at the hearing, confirming Detective Stewart's version of the identification procedures.

B. The trial

At trial, Di Giose described the robbery. He stated that on November 13, 1972, at approximately 8:55 a.m., two men entered the supermarket and that one held a revolver. The person with the gun then directed Di Giose to the store safe in the manager's booth. There the robber demanded and was given money which was kept in the safe and in Di Giose's desk, as well as cash in one of the registers. The robbers then left (T23-24).**

At trial, Di Giose identified appellant as the robber with the gun (T24-25). On cross-examination, Di Giose was questioned about the show-up which had occurred in the stationhouse (T39-41). During further questioning, the prosecutor elicited the fact that prior to the show-up

* The testimony at the hearing indicated that one of the robbers wore a leather jacket (S28; S34; S37; S56; S67-68).

** Numerals in parentheses preceded by "T" refer to pages of the trial transcript dated September 26, 1973.

Di Giose had been shown a photograph of the line-up and had identified appellant from the photograph (T43-44). Pauline Comperchio also testified at trial, describing the robbery and identifying appellant as the person with the gun (T65).*

The theory of the defense was that Comperchio and Di Giose had identified the wrong person. In support of this theory, appellant's wife testified on appellant's behalf. She stated that since at least 1954, appellant had tattoos on the fingers of both hands which collectively spell "true love" (TT4).** The State's witnesses had previously testified they had not noticed any tattoos on the hands of the robber (T41-42; T52; T73).

During summation, the Assistant District Attorney stated:

Look at the defendant, judge for
yourself, get the aura of arrogance
of this defendant.

(TT32)

Defense counsel's objection and motion for a mistrial were denied. The Assistant District Attorney repeated:

* In addition, Ann Ruta and John Tooze, employees of the supermarket, testified as part of the State's case. Both confirmed that a robbery had occurred on November 13, 1972. However, Ruta testified that she could not see the robber's face (T51), and Tooze stated that although he saw the robbers enter the store (T57), he did not see the actual robbery occur.

** Numerals in parentheses preceded by "TT" refer to pages of the trial transcript dated October 1, 1973. Specifically, appellant's wife testified that across appellant's right hand was the word "true" and on the left, the word "love."

Look at this defendant. See the aura,
the absolute aura of arrogance.
(TT32)

Again, defense counsel's motion for a mistrial was denied (TT32).

After deliberation, the jurors found appellant guilty of Robbery in the first degree and two counts of Grand Larceny. On November 16, 1973, appellant was sentenced to a term of imprisonment of ten years on the robbery count and four years on the larceny counts, all to run concurrently.

C. The appeal

Appellant raised two issues on appeal in State Court.* First, he contended that reversible error had been committed because the trial court permitted, over objection, Di Giose's testimony that he had previously identified a photograph of appellant.** To support this argument, appellant relied on State cases which hold that it is improper for a witness to testify about an extra-judicial identification of a photograph of a defendant, People v. Griffin, 29 N.Y. 2d 91, 323 N.Y.S. 2d 954 (1971); People v. Cioffi, 1 N.Y. 2d 70, 150 N.Y.S. 2d 192 (1956). See Defendant-Appellant's Brief in the Appel-

* Appellant's brief filed in the Appellant Division, Second Department was made part of appellant's habeas corpus application and is included in the record on appeal.

** The photograph in question was of the line-up which had occurred in the stationhouse. This issue was not raised in appellant's petition pursuant to 28 U.S.C. §2241, et. seq.

late Division, Second Department, at 7-11. Second, appellant argued that the prosecutor's summation was improper and denied appellant his right to a fair trial. Specifically, appellant contended that the prosecutor's statements that the jurors should look at the defendant and "get the aura of arrogance of this defendant" exceeded the bounds of fair comment. See Defendant-Appellant's Brief in the Appellate Division, Second Department at 12-15.

On June 24, 1974, appellant's conviction was affirmed (People v. Johnson, 357 N.Y.S. 2d 1014 (App. Div. 2d Dept.)) and leave to appeal to the Court of Appeals was denied.

D. Appellant's application pursuant to 28 U.S.C. §2241, et seq.

On October 29, 1975, appellant, pursuant to 28 U.S.C. §2241, et seq., filed a petition for writ of habeas corpus. He alleged that:

The identification procedures under a totality of circumstances in this case fall below Due Process Levels and deprived petitioner of a fair trial under the United States Constitution.

(Petition at 2,5)

In support of this position, appellant relied on Stovall v. Denno, 388 U.S. 293 (1967); Foster v. California, 394 U.S. 440, 442 n.2 (1969); and Palmer v. Peyton, 359

F.2d 199 (4th Cir. 1966).^{*} Appellant also argued that the prosecutor's comment during summation deprived appellant "of due process of law to receive a fair trial within the ambit of the Fourteenth Amendment," the same issue raised on appeal in State Court. See Petition at 8.

Judge Rayfiel denied appellant's application in an opinion dated November 10, 1975.^{**} Although the Judge found that appellant contended that the identification procedures leading to conviction constituted a denial of due process (Appellant's Appendix B at 1), the District Court held that the contentions relating to the "illegality and inadequacy of identification evidence and procedures 'present evidentiary questions which do not rise to the significance of constitutional violations.'" Appellant's Appendix B at 2. The District Court also found that the Assistant District Attorney's comments on summation did not constitute a denial of due process or a fair trial. Appellant's Appendix B at 4.

^{*} In his petition, appellant did not raise the question of the propriety of Di Giose's testimony about his pre-trial identification of appellant from a photograph of the line-up, one of the issues raised on appeal in State Court. The following cases indicate that this testimony does not involve error of constitutional dimension, if error at all: Gilbert v. California, 388 U.S. 263, 272-273 n.3 (1967); Brathwaite v. Manson, 527 F.2d 363 (2d Cir. 1975); United States v. Hines, 470 F.2d 225, 228 (8th Cir. 1972), cert. den. 410 U.S. 968 (1973).

^{**} The District Court's opinion is "B" to Appellant's Separate Appendix.

STATEMENT OF POSSIBLE ISSUES

There are three possible issues on appeal.

One issue, raised by appellant in his petition in the District Court, involves the suggestiveness of the identification procedures utilized in this case and specifically whether the show-up in the stationhouse, in light of the totality of the circumstances, (see Neil v. Biggers, 409 U.S. 188 (1972)), created a substantial likelihood of irreparable misidentification. United States ex rel Phipps v. Follette, 428 F.2d 912 (2d Cir.), cert. den., 400 U.S. 908 (1970); United States ex rel Gonzalez v. Zelker, 477 F.2d 797, 801 (2d Cir. 1973), cert. den., 414 U.S. 924 (1974); Brathwaite v. Manson, 527 F.2d 363 (2d Cir. 1975). However, this issue, not dealt with by the District Court, has not been presented to the State Courts, and appellant has therefore failed to exhaust his available State remedies.* Picard v. Connor, 404 U.S. 270, 278 (1971); United States ex rel Nelson v. Zelker, 465 F.2d 1121, 1123-25 (2d Cir.), cert. den., 409 U.S. 1045 (1972); United States ex rel. Gibbs v. Zelker, 496 F.2d 991 (2d Cir. 1974); United States ex rel Johnson v. Vincent, 507 F.2d 1309 (2d Cir. 1974).

* Appellant may challenge the identification procedures in State Court pursuant to C.P.L. §440.10(1)(h).

A second possible issue is whether the prosecutor's prejudicial comments during summation deprived appellant of a fair trial.

Absent a showing that the [prosecutor's] remarks were so improper as to deny petitioner a fundamentally fair trial, the claim raises no federal constitutional issue.

(United States ex rel. James v. Follette, 301 F. Supp. 569, 574, aff'd, 413 F.2d 708 (2d Cir. 1970), cert. den., 401 U.S. 979 (1971))

In applying this general standard, the Seventh Circuit found no constitutional error in Downee v. Burke, 408 F.2d 342 (7th Cir), cert. den., 395 U.S. 940 (1970), despite the prosecutor's comment that the defendant was a "big ape" and a "gorilla." See also, United States ex rel Castillo v. Fay, 350 F.2d 400, 401 (2d Cir. 1965), cert. den., 382 U.S. 1019 (1966); Paulson v. Turner, 359 F.2d 588 (10th Cir. 1966), cert. den., 385 U.S. 905; Chavez v. Dickson, 280 F.2d 727, 735 (9th Cir. 1960), cert den., 364 U.S. 934 (1961); Donnelly v. De Christoforo, 416 U.S. 637 (1974).

In Donnelly, the Supreme Court dealt with a claim similar to that presented here. There the prosecutor expressed a personal opinion about the defendant's guilt and made a comment which the jurors could have interpreted as indicating that the defendant had already admitted guilt to the prosecutor in an attempt to secure reduced

charges. Donnelly v. De Christoforo, supra, 416 U.S. at 642. The Supreme Court while not approving of these comments, held that they were trial errors, not amounting to a denial of due process. Donnelly v. De Christoforo, supra, 416 U.S. at 647, 648 n.23. In light of Downee, supra; Castillo, supra; Chavez, supra; and the Supreme Court's recent decision in Donnelly, supra, it is clear, as the District Court held here, that in the context of this trial, the prosecutor's comments did not constitute a due process violation.

The third possible issue that could be raised on appeal is whether the failure of the identifying witnesses to see the tattoos on appellant's hands denied appellant due process. However, this question involving the significance of the testimony about evidentiary matters, relates to the weight to be accorded the witnesses' identification testimony and to credibility and does not amount to a constitutional question, cognizable under federal habeas corpus. Gant v. Kropp, 407 F.2d 776, 778 (6th Cir. 1969), cert. den. 395 U.S. 916; United States ex rel Griffin v. Martin, 409 F.2d 1300, 1302 (2d Cir. 1969); Trujillo v. Tinsley, 333 F.2d 185, 186 (10th Cir. 1964). See also, Judy v. Pepersack, 284 F.2d 443, 444 (4th Cir. 1960), cert. den. 366 U.S. 939 (1961); United States ex rel Rooney v. Ragen, 173 F.2d 668, 671 (7th Cir.), cert. den., 337 U.S. 961 (1949).

CONCLUSION

For the foregoing reasons, there are no non-frivolous issues to be raised for this Court's review; accordingly, the motion of The Legal Aid Society, Federal Defender Services Unit, to be relieved as counsel should be granted.

Respectfully submitted,

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Attorney for Appellant
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509 United States Court House
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JONATHAN J. SILBERMANN

Of Counsel

Certificate of Service

May 3, 1976

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Nathan Silbermann

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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WILFRED JOHNSON, :

Appellant, :

-against- :

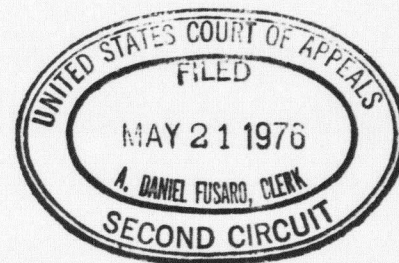
DOCKET NO. 76-2030

ROY BOMBARD, Superintendent, :
Green Haven Correctional Facility, :

Appellee. :

AFFIDAVIT

-----X
STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)



JOAN P. SCANNELL, being duly sworn, deposes and says:

1. I am a Deputy Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for the appellee herein. I submit this affidavit in concurrence with the brief submitted by the Legal Aid Society, Federal Defender Services Unit.

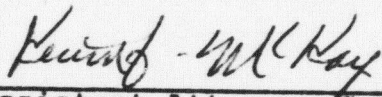
2. Petitioner-appellant appeals from a decision of the United States District Court for the Eastern District of New York (Rayfield, J.) dated November 10, 1975 dismissing sua sponte petitioner-appellant's application for a federal writ of habeas corpus. Judge Rayfield granted petitioner-appellant a certificate of probable cause.

3. The Federal Defender Services Unit of the Legal Aid Society has requested that they be relieved as counsel because there are no non-frivolous issues to be raised for this court's review. The respondent-appellee concurs with the Legal Aid Society. Upon review of the record, respondent-appellee also finds that there are no non-frivolous issues to be raised on appeal and requests that the decision of the lower court be affirmed.

WHEREFORE, respondent-appellee respectfully requests
that the decision of the District Court be affirmed.


JOAN P. SCANNELL

Sworn to before me this
21st day of May, 1976


Dep. Assistant Attorney General
of the State of New York

STATE OF NEW YORK
COUNTY OF NEW YORK

} ss.:

JOAN T. SCANNELL, being duly sworn, deposes and says
that she is employed in the office of the Attorney General of the
State of New York, the Attorney for respondent-appellee herein. On the 21
day of May, 1976 she served the annexed upon the following named persons:

Wilfred M. Jonathan J. Silber
Legal Aid Society
Federal Defender Services Unit
509 US Courthouse
Foley St. NY 10007

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly
enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at TWO WORLD
TRADE CENTER NEW YORK, N.Y. 10047 directed to said Attorney at the address within the State designated by her
for that purpose.

Sworn to before me this

21 day of May, 1976
Kevin J. McKay

Dep. Assistant Attorney General of
the State of New York

Joan T. Scannell

Docket No. 76-2030

UNITED STATES COURT OF
APPEALS
FOR THE SECOND CIRCUIT

WILFRED JOHNSON,
Appellant,

-against-

ROY BOMBARD, Superintendent,
Green Haven Correctional
Facility,

Appellee.

AFFIDAVIT

LOUIS J. LEFKOWITZ,
Attorney General

Attorney for Appellee

Office And Post Office Address
Capitol, Albany, N.Y. 12224

New York Office

TWO WORLD TRADE CENTER, NEW YORK, N.Y. 10047
Tel. 488-3390

Personal service of a copy of

within

is admitted this day of

19

Sir:

Please take notice that the within is a true
copy of a
this day duly entered herein in the office of
the Clerk of

Dated, N.Y., , 19

Yours, etc.,

LOUIS J. LEFKOWITZ,

Attorney General,

Attorney For

Office And Post Office Address

Capitol, Albany, N.Y. 12224

New York Office

TWO WORLD TRADE CENTER, NEW YORK, N.Y. 10047

To , Esq.

Attorney for

Sir:--

Please take notice that the within

will be presented for settlement and signature
herein to the Hon.
one of the judges of the within named Court, at

in the Borough of

City of New York, on the

day of

19 , at M.

Dated, N.Y., , 19

Yours, etc.,

LOUIS J. LEFKOWITZ,

Attorney General,

Attorney For

Office And Post Office Address

Capitol, Albany, N.Y. 12224

New York Office

TWO WORLD TRADE CENTER, NEW YORK, N.Y. 10047

To , Esq.

Attorney for